

**EXCERPT OF THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure met on June 11-12, 2007. All members attended.

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FEDERAL RULES OF EVIDENCE

Rule Approved for Approval and Transmission

The Advisory Committee on Evidence Rules submitted a proposed new Rule 502 with a recommendation that it be approved and transmitted to the Judicial Conference. The advisory committee proposed Rule 502 after the chairman of the House Judiciary Committee requested the Judicial Conference to undertake the rulemaking process to address concerns about privilege waivers. Unlike other proposed rule changes, under the Rules Enabling Act an amendment affecting an evidentiary privilege requires Congress to adopt the rule by affirmative act. (28 U.S.C. § 2074(b).)

The advisory committee held a conference at Fordham Law School with a select group of practitioners and academics to review a draft rule in April 2006. Appropriate changes were made to the draft to account for the suggestions and comments raised at the conference. The revised proposed rule was published for comment from the bench and bar in August 2006. The advisory committee held two public hearings on the proposed new rule at which numerous witnesses testified.

The proposed new rule facilitates discovery and reduces privilege-review costs by limiting the circumstances under which the privilege or protection is forfeited, which may

happen if the privileged or protected information or material is produced in discovery. The burden and cost of steps to preserve the privileged status of attorney-client information and trial-preparation materials can be enormous. Under present practices, lawyers and firms must thoroughly review everything in a client's possession before responding to discovery requests. Otherwise they risk waiving the privileged status not only of the individual item disclosed but of all other items dealing with the same subject matter. This burden is particularly onerous when the discovery consists of massive amounts of electronically stored information.

The proposed new rule is intended to reduce the risk of forfeiting the privilege or protection so that parties need not scrutinize information produced in discovery as much as they now do, in order to reduce the burden, cost, and time such scrutiny requires. The proposed rule does not affect the substantive law of privileges, which continues to be governed by common law in federal courts.

Proposed new Rule 502 contains four main provisions. The first codifies the majority view and protects a party from waiving a privilege if privileged or protected information is disclosed inadvertently in a federal court proceeding or to a federal public office or agency, unless the disclosing party was negligent in producing the information or failed to take reasonable steps seeking its return. The second protects a party from waiving a privilege covering all documents dealing with the same subject matter as a document that was disclosed, unless fairness requires such an extreme result. The third protects a party from waiving a privilege or protection if the court enters an order providing that disclosure of privileged or protected information does not constitute a waiver. The order is enforceable against all persons in any federal or state proceeding. The fourth provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding, binding only the parties.

If there is a disclosure of privileged or protected information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings. If there is a disclosure of privileged or protected information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver. As a practical matter, the proposed rule is consistent with the laws of most jurisdictions because a large majority of state and federal courts have rules or statutes that protect against waiver. But a handful of jurisdictions do not follow the majority view and waive the privilege if the information was inadvertently disclosed, regardless of the care taken to protect against disclosure. Absent a rule that provided protection against waiver in all jurisdictions, like proposed Rule 502, a careful party would have to continue to scrutinize all documents being disclosed – with the attendant cost, burden, and delay – rather than risk forfeiting the privilege in a later law suit in one of the outlier jurisdictions.

At the suggestion of the House Judiciary Committee chair, the advisory committee also considered a rule that would allow persons to cooperate with government agencies and disclose privileged information without waiving the right to assert privilege as to other parties in subsequent litigation. The provision is controversial and is the subject of pending legislation. After careful review of the competing interests involved in “selective waivers,” the advisory committee determined that it would not recommend this provision. Unlike inadvertent waivers, which raise the costs and burdens of the discovery phase of litigation, an area of great concern to the rules committees, the selective waiver provision addresses policy matters, principally the effectiveness of government investigations, that are largely outside the competence and jurisdiction of the rules committees.

Any rule creating, establishing, or modifying an evidentiary privilege requires legislation. Consequently, the advisory committee recommended that proposed Rule 502 be transmitted

directly by the Judicial Conference to Congress for its consideration with a recommendation that it adopt the rule.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference –

Approve proposed new Evidence Rule 502, and transmit it to Congress with a recommendation that it be adopted by Congress.

The proposed amendments to the Federal Rules of Evidence are in Appendix C with an excerpt from the advisory committee report.

Report to Congress on Marital-Communications Privilege

The Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248) requires the “Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States [to] study the necessity and desirability of amending the federal rules of evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against (1) a child of either spouse; or (2) a child under the custody or control of either spouse.”

With the exception of a single case, all courts that have considered the issue have already adopted an exception to the marital privileges for cases in which the defendant is charged with harming a child in the household. The single federal case that refused to adopt a harm-to-child exception to the adverse testimonial privilege is dubious authority, because its sole expressed rationale is that no court had yet established a harm-to-child exception, even though reported cases do in fact apply a harm-to-child exception in identical circumstances – including a previous case in the court's own circuit. The advisory committee decided not to recommend a rule amendment to respond to the aberrational decision that is not even controlling authority in its own circuit. Such an amendment is not only unnecessary but would also raise the following

problems: (1) piecemeal codification of privilege law; (2) codification of an exception to a rule of privilege that is not itself codified; (3) difficulties in determining the scope of such an exception, e.g., whether it would apply to harm to an adult child, a step-child, etc.; and (4) policy disputes over whether it is a good idea to force the spouse, on pain of contempt, to testify adversely to the spouse, when it is possible that the spouse is also a victim of abuse.

The advisory committee submitted a report as directed by the legislation setting out the reasons for its recommendation not to propose a rule. The report included draft language in the event Congress decided to move forward on the proposal.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference –

Approve sending the report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a “Harm to Child” Exception to the Marital Privileges to Congress.

The report is in Appendix D.

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